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SUPREME COURT, U.S.

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No. 98-85

In the

Supreme Court of the United States

October Term, 1997

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

APPELLANTS' REPLY IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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APPELLANTS' REPLY IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

In their motion to dismiss or affirm, appellees make two jurisdictional arguments. First, they contend that this appeal should be dismissed because the parties' dispute over the constitutionality of the 1997 plan has been mooted by events. Second, they contend that appellants are not entitled to seek this Court's review of the district court's ruling against them on the issue of claim preclusion, because they did not raise that defense specially in their answer. These arguments are patently without merit and deserve only brief response.

I. THIS APPEAL IS NOT MOOT.

The North Carolina legislature's passage of the 1998 interim plan did not moot this appeal. This Court has consistently held that a state legislature's enactment of a temporary, contingent measure to replace a statute that a lower court has invalidated and enjoined it from enforcing, pending its appeal from the lower court's ruling, does not render that appeal moot. *See Zablocki v. Redhail*, 434 U.S. 374, 382 n.9 (1978); *Bullock v. Carter*, 405 U.S. 134, 141-42 n.17 (1972); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 & n.11 (1982) (city's repeal of challenged ordinance, after it was held invalid by district court, did not moot its appeal from the district court's ruling, where the city

had expressed its intent to re-enact the same provision if the district court's judgment were vacated on appeal).[1]

These principles are fully applicable in this case. The North Carolina legislature did not pass the 1998 plan voluntarily; it did so only in response to the district court's injunction forbidding it to conduct elections under the 1997 plan, the very injunction which is the subject of this appeal. It did so only after both the court below and this Court had denied its request for a stay of that injunction pending the outcome of this appeal. It specifically provided that the 1998 plan would expire of its own force if this appeal should result in the reversal of the district court's decision holding the 1997 plan unconstitutional, and the 1997 plan automatically would resume its effectiveness should that occur. Under these circumstances, the controversy between the parties over the constitutionality of the 1997 plan cannot fairly be said to be moot. To hold otherwise would be to leave a state that has its congressional redistricting plan wrongly invalidated by a trial court in an untenable position: if it wants to contest that ruling on appeal, it must decline the opportunity to enact an interim plan and allow the trial court to design one for it, thereby

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[1] *Accord Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 422-23 (5th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996); *Beare v. Briscoe*, 498 F.2d 244, 245-46 n.5 (5th Cir. 1974). *See generally* 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3533.6, at 346-47 (3d ed. 1984) (statutory "changes adopted in response to a lower court ruling" will not moot an appeal from that ruling, if those changes "are made contingent on the outcome of [the appeal]").

ceding to the unelected federal judiciary -- for one or more election cycles -- its constitutional prerogative to design its own congressional districts. This Court should not require a state to pay such a price in order to obtain appellate review of a lower court decision invalidating its duly-enacted redistricting plan.

II. THE VALIDITY OF THE DISTRICT COURT'S RULING ON CLAIM PRECLUSION IS PROPERLY BEFORE THIS COURT.

This Court's jurisdiction to review the district court's ruling on the preclusion issue does not depend on whether appellants waived the preclusion defense by failing to raise it in a timely fashion.[2] Even when the parties have waived a preclusion defense, the trial court remains free to raise the defense *sua sponte*. *See Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 231 (1995) ("trial courts may in appropriate cases raise the res judicata bar on their own motion," even if the parties have waived it).[3] That is precisely what the trial court

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[2] Appellants did not waive the preclusion defense. While they did not specifically mention the term "preclusion" in their answer, the preclusion defense was fairly subsumed within their third affirmative defense: failure to state a claim upon which relief can be granted. In addition, the defense was specifically raised -- and vigorously pressed -- by a group of would-be defendant-intervenors.

[3] *Accord Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir.), *cert. denied*, 510 U.S. 902 (1993); *Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993); *McClain v. Apodaca*, 793 F.2d 1031, 1032-33 (9th Cir. 1986) (same). *See generally* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.51 (3d. ed. 1998).

did here: it raised the issue of claim preclusion *sua sponte* in the March 31, 1998 hearing on the cross-motions for summary judgment. After affording the parties a full and fair opportunity to be heard on the issue, the court then ruled specifically -- and wrongly -- that the claims asserted here were not barred by the final judgment entered by the three-judge panel on remand in the *Shaw* case.[4] Because the court below actually considered and resolved the preclusion issue, the validity of that ruling is properly before this Court on appeal, even if appellants failed to raise the preclusion defense in a timely manner below. *Cf. Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (When a state court assumes that a federal question is properly before it and proceeds to consider and resolve that question, this Court's jurisdiction to review the resulting ruling does not depend on whether the parties themselves properly raised the question in the state court proceedings.); *Payton v. New York*, 445 U.S. 573, 582 n.19 (1980) (same); *Raley v. Ohio*, 360 U.S. 423, 436 (1959) (same).[5]

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[4] *See* App. 3a-4a (Memorandum Opinion of April 14, 1998) ("Although it was a final order, the September 12, 1997 decision of the *Shaw* three-judge panel was not preclusive of the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan."). The court went on to explain the reason it had reached this conclusion in a lengthy footnote. *See* App. 4a n.1.

[5] That the court below went on to address the merits of the precluded claims is no reason for this Court to condone its blatant disregard of settled rules of preclusion law. To the contrary, if this Court does not reverse the district court's ruling on the preclusion issue, it will encourage courts in future cases not to take the preclusion doctrines seriously, which will lead to a much greater waste of judicial resources than would be occasioned by reversal here.

CONCLUSION

This appeal is not moot, and the preclusion issue is properly before this Court. For the reasons given in the jurisdictional statement appellants filed on July 6, 1998, this Court should either summarily reverse the April 6, 1998 judgment of the district court or note probable jurisdiction of this appeal.

Respectfully submitted,

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September 1998

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